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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION**

CENTER FOR BIOLOGICAL DIVERSITY, et al., Plaintiffs, and ALLIANCE FOR THE WILD ROCKIES and NATIVE ECOSYSTEMS COUNCIL, Consolidated Plaintiffs, vs. U.S. FOREST SERVICE, et al.,	Lead Case No. CV 22-114-M-DWM Member Case No. CV 23-3-M-DWM DEFENDANT- INTERVENOR/CONSOLIDATED DEFENDANT-INTERVENOR KOOTENAI TRIBE OF IDAHO'S UNOPPOSED MOTION FOR LEAVE TO FILE A SHORT RESPONSE TO NOTICE OF SUPPLEMENTAL AUTHORITY [ECF No. 89]
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**DEFENDANT-INTERVENOR/CONSOLIDATED
DEFENDANT-INTERVENOR'S UNOPPOSED
MOTION FOR LEAVE TO FILE SHORT
RESPONSE TO NOTICE OF SUPPLEMENTAL
AUTHORITY**

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<p>Defendants,</p> <p>and</p> <p>KIRSTEN KAISER, District Ranger, Kootenai National Forest, Three Rivers Ranger District, <i>et al.</i>,</p> <p>Consolidated Defendants.</p> <p>and</p> <p>KOOTENAI TRIBE OF IDAHO, Defendant-Intervenor/ Consolidated Defendant-Intervenor.</p>	
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The Kootenai Tribe of Idaho (the Tribe) respectfully seeks the Court’s leave to file the attached short response to Consolidated Plaintiffs Alliance for the Wild Rockies et al. (Consolidated Plaintiffs) Notice of Supplemental Authority (ECF No. 89), which referred the Court to the post-briefing decision *Alliance for the Wild Rockies v. Marten (Marten)*, CV 21-05-M-DLC, 2023 WL 4977712 (D. Mont. Aug. 3, 2023), involving Endangered Species Act challenges to certain programmatic documents on the Helena-Lewis and Clark National Forest. This motion is unopposed – Plaintiffs, Consolidated Plaintiffs and the Federal Defendants do not oppose the Tribe’s motion.

Respectfully submitted this 10th day of August, 2023.

s/ Julie A. Weis

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**Kootenai Tribe of Idaho's Proposed Short Filing Regarding Consolidated
Plaintiffs' Notice of Supplemental Authority**

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**DEFENDANT-INTERVENOR/CONSOLIDATED
DEFENDANT-INTERVENOR'S SHORT
RESPONSE TO NOTICE OF SUPPLEMENTAL
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<p>Defendants,</p> <p>and</p> <p>KIRSTEN KAISER, District Ranger, Kootenai National Forest, Three Rivers Ranger District, <i>et al.</i>,</p> <p>Consolidated Defendants.</p> <p>and</p> <p>KOOTENAI TRIBE OF IDAHO, Defendant-Intervenor/ Consolidated Defendant-Intervenor.</p>	
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The Kootenai Tribe of Idaho (the Tribe) offers the following observations regarding the post-briefing decision referenced in the Notice of Supplemental Authority (ECF No. 89) filed by Consolidated Plaintiffs Alliance for the Wild Rockies et al. See *Alliance for the Wild Rockies v. Marten (Marten)*, CV 21-05-M-DLC, 2023 WL 4977712 (D. Mont. Aug. 3, 2023) (involving unauthorized road use Endangered Species Act challenges to programmatic decisions on the Helena-Lewis and Clark National Forest).

First, unlike this case involving a site-specific action on the Kootenai National Forest, *i.e.*, the Black Ram Project, *Marten* involved programmatic

challenges to a Forest Plan Biological Opinion, *id.* at *6-11, and to Biological Opinions for two Travel Plans plus Biological Assessments for two additional Travel Plans on the forest. *Id.* at *11-14. Further, in addition to the programmatic versus site-specific action distinction, the unauthorized road use claims in *Marten* arose under the Endangered Species Act rather than under the statutes at issue in this case, the National Forest Management Act and National Environmental Policy Act. Put simply, unlike *Marten*, this case does not involve an Endangered Species Act unauthorized road use challenge to a programmatic Biological Opinion (nor to a project-specific Biological Opinion for that matter).

Second, the unauthorized road use allegations in *Marten* rested on types of data not at issue in this case. Specifically, *Marten* involved allegations of “hundreds of law enforcement records of illegal motorized use across the Forest,” and “hundreds of miles of roads that were closed on paper [yet] still physically open to motorized use.” *Id.* at *9. This case involves no such allegations or types of data so is factually distinct.

Third, whereas *Marten* found (at *12) that the evidence of ineffective road closures rose to the level of the chronically ineffective road closures held illegal in *Alliance for the Wild Rockies v. Probert*, 412 F. Supp. 3d 1188, 1202-08 (D. Mont.

2019), the Black Ram evidence is plainly distinguishable from that in *Probert*.

This relates to the Tribe's argument in its opening summary judgment brief (ECF No. 66) at pages 40-41, 42-45, 49-50 and in its reply brief (ECF No. 82) at pages 49-50 regarding the effectiveness of road closures in the Black Ram Project area.

This also relates to the Federal Defendants' argument in their opening summary judgment brief (ECF No. 61) at pages 58-66 and in their reply brief (ECF No. 80) at pages 32-35 regarding the effectiveness of road closures in the Black Ram

Project area. More fundamentally, this relates to Federal Defendants' argument in their opening summary judgment brief (ECF No. 61 at 56-58) that Consolidated Plaintiffs forfeited their ineffective road closures argument.

Respectfully submitted this 10th day of August, 2023.

s/ Julie A. Weis

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of August, 2023, I caused to be served a true and correct copy of the foregoing document, via CM/ECF on:

Clerk of U.S. District Court

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